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Supreme Court, U.S.
FILED
06-408 SEP 19 2006
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No. 06-

IN THE

Supreme Court of the United States

ACACIA MORTGAGE CORPORATION,

Petitioner,

v.

RODNEY L. JOFFE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

DANIEL L. KAPLAN
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, AZ 85012
(602) 640-9000

Attorney for Petitioner

202554

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "Act"), makes it unlawful to use an "automatic telephone dialing system" to make a "call" to any "telephone number" assigned to a "cellular telephone service." The questions presented are:

(1) Whether the Act prohibits the use of a computer to send a text message that terminates on a cellular telephone handset, and

(2) If so, whether the Act in this application violates the First Amendment to the United States Constitution.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Acacia Mortgage Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner Acacia Mortgage Corporation respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona in this case.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals (Pet. App. at 1a-29a), is reported at 121 P.3d 831 and 211 Ariz. 325. The trial court's judgment (*id.* at 30a-32a), and minute entry (*id.* at 33a-35a), are unreported.

STATEMENT OF JURISDICTION

The Arizona Supreme Court denied review of the Court of Appeals' decision on May 23, 2006 (*id.* at 35a). On August 14, 2006, Justice Kennedy extended Petitioner's time to file a petition for a writ of certiorari to and including September 20, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Since a federal law is or may be unconstitutional, notification required by Rule 29.4(b) has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Telephone Consumer Protection Act, 47 U.S.C. § 227, is included in the Appendix to this Petition at Pet. App. 36a-58a.

STATEMENT OF THE CASE

Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("the Act"), in 1991, to address consumer complaints resulting from "the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective." S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. Of principal concern was telephone equipment that resulted in calls that "fill the entire tape of an answering machine," and fail to "disconnect the line for a long time after the called party hangs up the phone." *Id.*; *see also* H.R. Rep. No. 102-317, at 10 (1991) (decrying automated calling systems that "seize" a called party's telephone line and continue to occupy it "even when the called party hangs up"). The relevant

section of the Act, entitled "Restrictions on use of telephone equipment," ultimately prohibited the making of telephone calls using automated telephone dialing systems that seize the recipient's telephone line to deliver recorded voice messages. 47 U.S.C. § 227(b)(1).

In 2000 and 2001, several members of Congress began to become concerned about the increasing use of unsolicited commercial text messages directed both to computers and to mobile wireless devices, including cellular devices. In 2000, Congress considered a bill entitled the "Wireless Telephone Spam Protection Act," H.R. 5300, 106th Cong. (2000), specifically designed to address problems created by "[n]ew technologies" such as wireless e-mail. The following year, Congress again considered banning e-mail intended to be received by cellular phones. H.R. 113, 107th Cong. (2001) ("Wireless Telephone Spam Protection Act").

Neither of these bills passed, but in 2003 Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM" Act), 15 U.S.C. §§ 7701-7713. The CAN-SPAM Act was enacted to address (among other things) the "new problem" "heading our way" that "quite likely is going to rise to a level of being a problem that eclipses even computer spam" – *i.e.*, the problem of "cell phone spam." 149 Cong. Rec. H12195 (2003). In urging his colleagues to support the bill, Congressman Holt described the CAN-SPAM Act as "a good first step towards ending the onslaught of e-mail spam and the tsunami of wireless spam." *Id.* at H12197.

In early 2000, nearly three years *before* the CAN-SPAM Act became effective, an employee of Petitioner Acacia Mortgage Corporation ("Acacia") used a computer connected

to the internet to send information via e-mail about mortgage refinancing. The messages were sent to an electronic mail address that included the internet domain name "@att.net." Pet. App. at 2a-3a.

After receiving two of these messages on his cellular telephone, Respondent Rodney L. Joffe sued Acacia, alleging that Acacia had violated the Act by making a "call" to a telephone number assigned to a cellular telephone service. Pet. App. at 2a-3a. Joffe later sought to expand his claim by claiming to represent a class of 90,000 recipients of the offending messages. Pet. App. at 4a. Acacia moved for summary judgment, raising two arguments. First, Acacia argued that the text message that had been routed to Joffe's telephone did not constitute a "call" covered by the Act. Second, Acacia argued that, if such a message were covered by the Act, in this application the Act would constitute an abridgement of free speech violating the First Amendment.

The trial court denied Acacia's motion and entered judgment in Joffe's favor as to liability only.[1] Pet. App. at 30a-32a.

Acacia appealed the judgment to the Arizona Court of Appeals, raising the same arguments. Acknowledging that it appeared to be the first court in the Nation to address the issue, Pet. App. at 11a, the Court of Appeals held that the Act applies to text messages delivered to cellular phones, and affirmed. The court reasoned that the Act's use of the word "call" was intended to encompass any "attempt to communicate by telephone," which (it held) would include

1. An Arizona statute permits a party to appeal an interlocutory judgment when the only remaining issue is the amount of the recovery. Pet. App. at 5a n.3.

sending a text message to an email address under circumstances in which the message terminates on a cellular telephone handset. Pet. App. at 10a. The Court rejected Acacia's First Amendment argument, reasoning that the Act's restriction on the dissemination of text messages to cellular telephones was narrowly tailored to advance the purpose of protecting the privacy of the home. Pet. App. at 26a-28a.

Acacia filed a timely petition for review in the Arizona Supreme Court, which summarily denied the petition. Pet. App. at 35a.

REASONS FOR GRANTING THE PETITION

This case raises an issue of first impression regarding the construction of a key provision of the Telephone Consumer Protection Act, an important federal statute that restricts the dissemination of commercial messages. In concluding that Congress intended the term "call" to encompass any "attempt to communicate by telephone," the court of appeals radically broadened the Act's prohibitions beyond what Congress intended, subjecting individuals and businesses to potentially massive liability and undermining Congress's carefully-crafted regulatory scheme.

The case also raises an important First Amendment issue regarding the validity of imposing broad burdens on the dissemination of commercial messages to cellular telephones on the rationale that such burdens advance the government's interest in protecting the "privacy of the home." The court of appeals' application of this Court's precedents relating to the "privacy of the home" in the context of cellular telephone communications is deeply misguided, and if left unchecked could tend to inspire other courts and decisionmakers to apply these precedents in ways that bear no relation to their underlying rationales.

I. The Court Should Grant Certiorari in Order to Reject the Court of Appeals' Overexpansive Construction of the Key Term "Call" as Used in the Act, and to Preserve the Integrity of Congress's Regulatory Scheme.

A. The Court of Appeals Decision Broadly Expands the Scope of this Important Statute.

Certiorari is appropriate when a case raises an important issue of first impression regarding the operation of a federal statute. *E.g.*, *Am. Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964). The Act qualifies as an important federal statute. It imposes far-reaching and severe restrictions on popular methods of telemarketing, has been the subject of, or cited in, hundreds of federal and state appellate and trial court decisions and decisions of federal and state regulatory and other executive bodies, and has been examined in numerous articles in legal and business periodicals, including an American Law Reports Annotation completely devoted to the subject. *See* William G. Phelps, Annotation, *Validity, Construction and Application of Telephone Consumer Protection Act (47 U.S.C. § 227)*, 132 A.L.R. Fed. 625 (1996). The court of appeals decision is the first in the Nation to decide a crucial question regarding the scope of this important statute's prohibitions.

The question presented implicates a key issue regarding the Act's operation. The Act prohibits the use of an automatic telephone dialing system to make any "call" (with narrow exceptions) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, other radio common carrier service, or any service for which the called party is charged. 47 U.S.C. § 227(b)(1)(A)(iii) (Pet. App. 37a-38a). It allows private

litigants to collect a $500 bounty for each "call," which may be tripled where the violation is found to be "willful[]" or "knowing[]" (*id.* § 227(b)(3) (Pet. App. 44a)), and – as the instant case demonstrates – it opens the door for multi-million-dollar class action lawsuits against those who broadly disseminate prohibited "calls." *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844 (Ariz. Ct. App. 2002) (holding that class action could be brought under the Act). The issue of exactly what qualifies as a "call" is the linchpin for determining an individual's vulnerability to a potentially massive liability.

The definition of this key term adopted by the court of appeals could hardly be more expansive. The court determined that the term encompasses any "attempt to communicate by telephone," including an "attempt" that involves sending a text message to an email address, when the message is forwarded automatically to a cellular telephone handset. Pet. App. 12a, 17a. Given the broad array of methods by which individuals and businesses may attempt to "communicate" with devices that include functions associated with telephones, the scope of conduct drawn in by the court's novel definition is potentially staggering. And as telecommunications technology continues its rapid advance, the shadow cast by the court of appeals' decision will grow in tandem, reaching out to cover all newly-emerging communications protocols that may be deemed "attempts to communicate by telephone." Indeed, advances in telecommunications may be stymied by the court of appeals decision, out of concern that their use might subject users to liability under the court of appeals' expansive interpretation of the Act.

The court of appeals' novel interpretation of the Act interferes with Congress's attempt to regulate carefully and deliberately in the field of unsolicted commercial communications. It was not until over a decade *after* it enacted the Act that Congress resolved to address the issue of wireless commercial text messaging. Eschewing a blunderbuss approach, Congress in the CAN-SPAM Act directed the Federal Communications Commission ("FCC") to promulgate rules that would provide wireless subscribers with the ability to "avoid receiving" such unwanted commercial text messages. 15 U.S.C. § 7712(b)(1). Wary of possible unfairness to an innocent sender, Congress directed the FCC to take into consideration a sender's ability "to reasonably determine" that a particular message fell within the ambit of the Act. *Id.* § 7712(c). The FCC implemented Congress' mandate by promulgating regulations that allow individuals to opt out of receiving further messages from a particular sender, and that also provide for the creation of a public registry of domain names whose users desire that they be off limits to text messages. 47 C.F.R. § 64.3100 (2006). Because Congress was concerned about fairness to the sender, the FCC specified that a message would not violate the regulations unless the domain name to which it was sent had been on the public registry for at least thirty days. *Id.* § 64.3100(a)(4). Both the Act and the regulations specifically restrict their application to *commercial* messages. 15 U.S.C. § 7712(b); 47 C.F.R. § 64.3100(a) (2006).

The court of appeals decision damages the regulatory edifice carefully crafted by Congress and the FCC. Pursuant to the court of appeals decision, the Act is deemed to have introduced a Draconian restriction on *all* machine-dialed wireless text messaging, and to have done so twelve years before Congress enacted the CAN-SPAM Act. As the court

of appeals reads the Act, it prohibits any use of an automatic telephone dialing system (or computer) to engage in any attempt "to communicate by telephone," including by the sending of text messages. The restriction is not limited to commercial messages, or to situations in which the recipient has previously opted out of receiving such messages, nor is there any requirement that the sender have received actual or constructive notice that the domain name in question is off limits to text messages. In place of these prudent measures is a per-message "bounty" of hundreds of dollars – which is readily transformed into millions of dollars where (as here) the plaintiff alleges that he represents a large class of message recipients.

B. The Court of Appeals Decision Cannot be Reconciled with the Act's Plain Language or the Legislative Record.

The Act's plain language cannot support the court of appeals' broad construction. The Act provides:

> It shall be unlawful for any person within the United States . . . to make any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service.

47 U.S.C. § 227(b)(1)(A)(iii). Because Congress provided no definition of the word "call," the term must be construed in a manner consistent with its plain and ordinary meaning and its context within the statute. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

Viewed in isolation, the term "call" could have any of a variety of meanings, including not only telephone call, but also oral summons, demand of a stock option for redemption, brief visit, or the matching of a bet. *Webster's Ninth New Collegiate Dictionary* 197 (1989). But the context in which the term appears in the Act shows that the proper construction of the term "call" here is "*telephone* call": The same sentence of the statute refers to calls made by an "automatic telephone dialing system" (47 U.S.C. § 227(b)(1)(A)) (which is defined as a device that stores and dials "telephone numbers" (*id.* § 227(a)(1)), every subpart following that sentence refers to either "telephone line" (*id.* § 227(b)(1)(A)(i), (ii)) or "telephone number" (*id.* § 227(b)(1)(A)(iii)), the title of the subsection refers to "automated telephone equipment" (*id.* § 227(b)), the title of the section is "Restrictions on the use of telephone equipment" (*id.* § 227), and Congress entitled the Act the "Telephone Consumer Protection Act" (Pub. L. No. 102-243, § 1, 105 Stat. 2394 (1991)) and inserted it between two other sections of the United States Code that deal with telephone service (47 U.S.C. § 226 (operator services); *id.* § 228 (pay-per-call services)). These contextual indications leave little room for doubt that Congress's use of the word "call" in section 227(b)(1)(A) was intended to refer to a *telephone* call. *Cf. King*, 502 U.S. at 220-21 (deriving meaning of statutory term from its statutory context).

The plain language of section 227(b)(1)(A) therefore prohibits the use of automated dialing equipment only when it is used to make a telephone call. The one-way transmission of a text message, however, does not fit within the ordinary understanding of a telephone call. Indeed, essential to the concept of communication by telephone is the transmission of voice or sound. The telephone would not have been a

noteworthy invention if it were merely a mechanism for transmitting *text* across wires, because a mechanism for doing that (the telegraph) was already in wide use when the telephone was invented. *See* Peter W. Huber et al., *Federal Telecommunications Law* § 1.2.1, at 6 (2d ed. 1999). The very word "telephone" comes from Greek words meaning "far off" and "voice" or "sound," *The American Heritage Dictionary of the English Language* 1779 (4th ed. 2000), and the telephone was the first instrument "in which *sound* is converted into electrical impulses for transmission by wire," *Webster's Ninth New Collegiate Dictionary* 1212 (1989) (emphasis added).

Applying this straightforward observation, a number of courts have rejected the efforts of administrative entities to apply their legal authority to regulate telephone communication as a basis for regulating other media, such as television transmission or one-way radio paging, that do not involve two-way voice communication. *Illinois Consolidated Tel. Co.* v. *Illinois Commerce Comm'n*, 447 N.E.2d 295, 297 (Ill. 1983) (company that provides one-way radio paging does not thereby transmit "telephone messages" because "the capacity for two-way communication by voice [i]s an essential of the concept of the telephone"); *Minnesota Microwave, Inc.* v. *Public Serv. Comm'n*, 190 N.W.2d 661, 666 (Minn. 1971) (company that provides closed-circuit television programs is not a "telephone company" or a supplier of "telephone service" because it provides "only one-way transmissions," whereas "[t]he availability of two-way communication [is] a factor characterizing telephone service"); *Television Transmission, Inc.* v. *Public Utilities Comm'n*, 301 P.2d 862, 865 (Cal. 1956) (company that operates community television antenna does not facilitate communication "by telephone" because in telephone

communication "one may carry on a two-way communication by speaking as well as listening").

Likewise, the FCC required "[l]ittle discussion" to reject a community antenna television company's effort to bring itself within statutory language referring to "telephone exchange service," noting that "[m]anifestly, the phrase is intended primarily to apply to a telephone or comparable service involving 'intercommunication,' *i.e.*, a two-way communication, not the one-way transmission of signals which takes place with respect to [community antenna television] channel service." *In the Matter of General Telephone Co. of California*, 13 F.C.C.2d 448 (F.C.C. 1968). The United States Court of Appeals for the District of Columbia Circuit (per then-Judge Warren E. Burger) easily affirmed the Commission's "summary rejection" of the company's argument in a footnote, agreeing that "[c]learly, [community antenna television] channel distribution service does not contemplate furnishing subscribers with 'intercommunicating service' of the type usually identified with a telephone exchange." *General Telephone Co. of California* v. *F.C.C.*, 413 F.2d 390, 401 n.19 (D.C. Cir. 1969).

The legislative record bolsters the conclusion mandated by the Act's plain language. The reports that accompanied the bills that became the Act clearly identify Congress's purposes in restricting the use of automatic dialing machines to make "calls," and these purposes relate specifically to the initiation of two-way voice communications. The Senate Committee on Commerce, Science, and Transportation enumerated its reasons for restricting "automated calls," including in its list the facts that they "fill the entire tape of an answering machine," "will not disconnect the line for a long time after the called party hangs up the phone, thereby

preventing the called party from placing his or her own calls," "do not respond to human voice commands to disconnect the phone," and may "t[ie] up all the lines of a business . . . preventing any outgoing calls." S. Rep. No. 102-178, at 2, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. The committee report on the House bill likewise referred to the problem of automated calling systems that could "seize" a called party's telephone line and continue to occupy it "even when the called party hangs up." H. Rep. No. 102-317, at 10.

The concerns enumerated in these reports make perfect sense with respect to two-way voice communications, but have noting to do with the one-way transmission of text messages. Text messages cannot fill the "tape" of an "answering machine," occupy a telephone line after the called party has "hung up" (indeed, it is not clear what it could mean for a person to 'hang up' on a text message), respond to "voice commands," or prevent outgoing calls from all "lines" of a business.

Finally, in assessing the court of appeals' construction of the Act, the Court should consider the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (citing cases). As demonstrated below, the court of appeals' construction of the Act at the very least raises doubts as to the Act's constitutionality.

In short, the Act's language and legislative history demonstrate clearly that Congress's use of the word "call" in section 227(b)(1)(A) was not intended to refer to the delivery of a text message.

II. If the Court of Appeals' Construction of the Act is Correct, the Act Should be Struck Down as an Unconstitutional Abridgement of Free Speech.

A. The Court of Appeals' Reading of the Act Would Expose it to Grave Doubts Under the First Amendment

The freedom to communicate guaranteed by the First Amendment's Free Speech Clause extends to the *circulation*, as well as to the articulation, of expression. *See Talley v. California*, 362 U.S. 60, 64 (1960). According to the court of appeals, the Act prohibits any use of a computer to send an e-mail to an e-mail address assigned to a cellular telephone. As a content-neutral restraint on the "manner" of expression – *i.e.*, a restraint on the use of computers to disseminate text messages to cellular telephone handsets – the restrictions may be upheld only if they (i) are justified without reference to the content of the regulated speech, (ii) are "narrowly tailored" to serve a "significant governmental interest," and (iii) leave open "ample alternative channels" for communication of the information. *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984).[2]

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2. The pertinent provisions of the Act are neither specifically aimed at, nor in any way limited to, *commercial* speech, which is considered to be "of less constitutional moment than other forms of speech." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 n.5 (1980). The court of appeals' reading of the Act therefore should not be evaluated under the standards applied to restrictions directed at this lower-value category of speech.

In the First Amendment intermediate-scrutiny context, a court must assess the challenged law by reference to the precise interests put forward by the government, and cannot rely on theoretical rationales suggested by a private litigant. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). When it enacted the Act, however, Congress did not articulate *any* "significant governmental interest" that would be advanced by prohibiting the use of computers to send text messages to cellular telephone handsets. This was presumably because, as shown above, Congress never intended for the Act to apply to this conduct at all. Bereft of any cognizable justification, the restriction that the court of appeals read into the Act cannot survive First Amendment scrutiny.

The Court of Appeals nevertheless concluded that this restriction could be justified as a means of "[p]rotecting the privacy of the home." Pet. App. at 26a. But even if it *had* been articulated by Congress, the "privacy of the home" rationale could not justify this speech-abridgement. This restriction cannot reasonably be viewed as tailored to advance the goal of "protecting the well-being, tranquility, and privacy of the home," *Carey v. Brown*, 447 U.S. 455, 471 (1980), or ensuring an individual's "right to be left alone in the privacy of the home." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 77 (1983) (internal quotation marks omitted). Cellular telephones are at least as likely to be used *outside* of the home as in it – indeed, that is their very purpose – and individuals carry them because they do not *want* to be "left alone."

Furthermore, even if the mere receipt of a text message on a cellular telephone implicated a substantial privacy interest, the restriction that the court of appeals read into the Act would not advance that interest. The privacy-interruption

caused by the receipt of a text message does not depend on whether a computer or person sent the message. Acacia could have achieved the same result by hiring operators to send the text messages to the same recipients, without implicating the Act. Under the court of appeals' construction, therefore, this portion of the Act would accomplish nothing more than making a certain form of communication more expensive. But the First Amendment does not permit the government to regulate speech by making it more expensive to engage in. *See Buckley v. Valeo*, 424 U.S. 1, 49 (1976) ("The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.").

This Court has rejected the "privacy" rationale as a justification for restrictions on practices much more intrusive than text messages sent to telephone handsets. "For over 50 years," for example, "the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 160 (2002). Notably, the recipient of a text message on a cellular telephone hardly feels called upon to engage in any sort of conversation, or even to hear the speaker's message at all – in contrast to a person inside a home while a canvasser or solicitor is standing at his door. The Court has also repeatedly affirmed that the "privacy" burdens imposed by unsolicited paper mail are insufficient to justify a restriction on that method of expression. *Bolger*, 463 U.S. at 72 ("the short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far

as the Constitution is concerned") (internal quotation marks omitted); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 542 (1980) (the recipient of unsolicited mail "may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket"). These burdens are smaller still for the recipient of a wireless text message, who need only glance at the message when convenient, then delete it with the push of a button.

Finally, a speech-restricting measure cannot be regarded as a "narrowly-tailored" means of achieving a particular purpose when alternative, less-speech-restrictive means of achieving the same purpose are available. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). It is not necessary to survey all of the various less speech-restrictive methods that Congress could take with respect to wireless text messages to show that the speech-restriction that the court of appeals reads into the Act is not "narrowly tailored." It is sufficient to note that Congress has actually *taken* a narrower and less speech-suppressing approach in the CAN-SPAM Act, as shown above.

It is thus evident that the court of appeals' construction of the Act raises serious questions as to its constitutionality. The court of appeals erred in failing to construe the Act in a manner that would have avoided this constitutional difficulty.

The Court should grant certiorari to remove this constitutional cloud from the Act, and to ensure that the court of appeals' serious misinterpretation of its scope is not accepted by other courts. Alternatively, if the Court believes that the court of appeals' construction of the Act was correct, it should grant certiorari and strike down the pertinent provision of the Act under the First Amendment's Free Speech Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL L. KAPLAN
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, AZ 85012
(602) 640-9000

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF ARIZONA, DIVISION ONE FILED SEPTEMBER 20, 2005

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 02-0701

DEPARTMENT E

RODNEY L. JOFFE,

Plaintiff-Appellee,

v.

ACACIA MORTGAGE CORPORATION, an Arizona corporation, f/k/a ACACIA NATIONAL MORTGAGE CORPORATION, an Arizona corporation,

Defendant-Appellant.

OPINION

NORRIS, Judge.

¶1 Acacia Mortgage Corporation ("Acacia") appeals from the superior court's order granting what was in effect partial summary judgment in favor of Rodney Joffe. The superior court found Acacia had violated the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227 (Supp.

2005),[1] by delivering unsolicited advertisements, in the form of text messages, to Joffe's cellular telephone. Acacia argues the superior court should not have ruled against it because the TCPA does not apply to text messages, and if it does, the TCPA violated its rights under the First Amendment. For the following reasons, we affirm the superior court's order and hold the TCPA applies to the text messages at issue here and does not violate Acacia's First Amendment rights.

BACKGROUND AND PROCEDURAL HISTORY

¶2 On January 6, 2001, Joffe's cellular telephone rang. When he answered it, he discovered he had received an unrequested text message solicitation from Acacia, a mortgage company. The message stated, "[C]arla, Greenspan lowered rates, 30 yr mortgage=6.875%. Still interested? 602-944-7200 or www.AcaciaNational.com[.]" On March 21, 2001, Joffe received a second text solicitation from Acacia on his cellular telephone. In similar form, this message stated, "Mr. Simms, Federal Reserve just cut rates by 1/2%. Still want new mortgage? 480- 897-8944. . . ."

¶3 Acacia's messages to Joffe were part of a marketing campaign to advertize low interest rates on home mortgages. Acacia programmed its computers to send the solicitations as electronic mail messages ("e-mail") over the Internet to consumer e-mail addresses. In Joffe's case, Acacia's computers generated his cellular telephone number, "(602)XXX-XXXX,"[2]

1. We cite to the current version of the applicable statutes if no revisions material to the decision have occurred.

2. For privacy reasons, we have deleted the last seven digits of Joffe's cellular telephone number.

plus his cellular telephone carrier's domain name, "att.net," and sent the solicitations to the e-mail address 602XXXXXXX@att.net.

¶4 When Acacia's e-mails reached Joffe's cellular carrier's domain, his carrier automatically converted the text, that is, the content of the solicitations, into a format that could be transmitted to Joffe's cellular telephone number. Acacia was thus able to take advantage of a service provided to Joffe by his cellular telephone carrier known as Short Message Service ("SMS"). As discussed in more detail below, SMS allows cellular telephone subscribers to send and receive text messages, known as SMS messages, on their cellular telephones.

¶5 On April 26, 2001, Joffe filed a complaint in justice court alleging Acacia had violated the TCPA's prohibition on using "any automatic dialing system" to make "any call" to "any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). Acacia answered the complaint and filed a counterclaim requesting $55,000 in damages for "harassment." Because the amount sought by Acacia in its counterclaim exceeded the jurisdiction of the justice court, the case was transferred to superior court. After the transfer, Acacia moved for summary judgment arguing the TCPA was inapplicable because it had simply sent Joffe e-mails. The superior court denied the motion:

> By using an e-mail address composed primarily of a telephone number, [Acacia] initiated a telephone message to a telephone number assigned to a cellular telephone service. By this

> method, [Acacia] initiated a demand to make a connection to [Joffe's] cellular telephone for the purpose of delivering a message by telephone encouraging the purchase of services or investment in a product offered by [Acacia]. By doing advertising in this manner, [Acacia] shifted some of the cost of its advertising to those receiving the telephone calls. The Court is of the opinion that such conduct violates the [TCPA].

¶6 Following the superior court's ruling, Joffe moved to certify the case as a class action, alleging Acacia had sent the same promotional messages to 90,000 cellular telephones using the same method of transmission and form of e-mail address. Thereafter, Acacia filed a second "motion for summary judgment or, in the alternative, motion for reconsideration," and argued the TCPA was directed at telephone calls that involved two-way voice communications and not at the sending of text messages. In response, Joffe filed a cross-motion for summary judgment and asked the superior court to grant summary judgment one way or the other on the issue of Acacia's liability under the TCPA.

¶7 Relying on its prior ruling, the court granted what was in effect partial summary judgment in favor of Joffe and held Acacia liable under the TCPA. The court also rejected Acacia's argument the TCPA violated its rights under the First Amendment to the United States Constitution.

¶8 Acacia timely appealed. As a consequence of the appeal, the superior court took no action on the motion to certify the

class. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(G) (2003).[3]

DISCUSSION

¶9 Whether the TCPA applies to Acacia's actions turns on the wording of 47 U.S.C. § 227(b)(1)(A)(iii) and the resolution of two issues: first, whether Acacia called Joffe, and, second, if it did, whether Acacia used an "automatic dialing system" to do so.[4] For the following reasons, we hold Acacia called Joffe using an automatic dialing system. Consequently, we agree with the superior court that Acacia violated the TCPA.

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3. On April 15, 2003, relying on our opinion in *Mezey v. Fioramonti*, 204 Ariz. 599, 65 P.3d 980 (App. 2003), *overruled by Bilke v. State*, 206 Ariz. 462, 80 P.3d 269 (2003), this court dismissed Acacia's appeal as an improper interlocutory appeal. On February 13, 2004, the Arizona Supreme Court remanded the case to this court for reconsideration in light of *Bilke*, *206 Ariz.* at 465, ¶ 12, 80 P.3d at 272 (A.R.S. § 12-2101(G) allows appeals from interlocutory judgments when only remaining issue determines amount of recovery). We determined the superior court's order granting partial summary judgment complied with the requirements set out in *Bilke* for an interlocutory appeal. Accordingly, on August 3, 2004, we vacated our April 15, 2003 order and scheduled briefing.

4. We review a superior court's decision granting summary judgment de novo. *Great Am. Mortgage v. Statewide Ins. Co.*, 189 Ariz. 123, 125, 938 P.2d 1124, 1126 (App. 1997). When, as here, the parties do not dispute the material facts, we must determine whether the trial court correctly applied the law to those facts. *Walgreen Ariz. Drug Co. v. Ariz. Dep't of Rev.*, 209 Ariz. 71, 72, ¶ 6, 97 P.3d 896, 897 (App. 2004). Matters of statutory interpretation are issues of law we review de novo. *Id.*

Appendix A

I. The TCPA

¶10 Enacted in 1991 as an amendment to the Communications Act of 1934, the TCPA was designed to deal with various telemarketing practices arising out of the telemarketing industry's use of sophisticated equipment, generically known as autodialers, to generate millions of automated telephone calls to residential and business telephone subscribers. S. Rep. No. 102-178, at 2-3 (1991), as *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969-71. Congress found consumers and businesses were especially frustrated by these calls, viewing them as a nuisance, an invasion of privacy and a threat to interstate commerce. *Id.* at 1; Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991) (current version at 47 U.S.C. § 227). Accordingly, as relevant here, the TCPA prohibits "any call" using "any automatic dialing telephone system" to "any telephone number assigned to a . . . cellular telephone service." Section 227(b)(1)(A)(iii) reads as follows:

> It shall be unlawful for any person within the United States . . .
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice —
>
> . . .

> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

¶11 Congress delegated authority to the Federal Communications Commission ("FCC") to promulgate regulations implementing the TCPA's requirements. 47 U.S.C. § 227(b)(2). The FCC's regulation implementing § 227(b)(1)(A)(iii) states:

> No person . . . may: (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice . . . (iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 C.F.R. § 64.1200 (2004).

A. Acacia Called Joffe

¶12 The TCPA does not define the word "call." Stating the word call should be given its ordinary meaning, Acacia argues the TCPA only regulates what it describes as ordinary telephone calls — calls that present the potential for two-way real time voice "intercommunication," that is, "a

connection that allows two people to speak to each other in 'real time' as though they were face-to-face." Under Acacia's description of a call, it did not call Joffe because, first, its text messages lacked the foregoing characteristics of a traditional telephone call, and second, it simply sent e-mail to an e-mail address.

¶13 To decide what Congress intended when it used the word call, we apply familiar rules of statutory construction. We begin with the language of the TCPA and interpret its words "as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979).[5]

¶14 Viewed in isolation, the word call has many plain and ordinary meanings. *See generally* Webster's Third New Int'l Dictionary Unabridged 317-18 (1993); Webster's Ninth New Collegiate Dictionary 197 (1990); Random House College Dictionary 192 (1988). Call can be used as both a verb and a noun. As a verb "call" can mean "to command or request . . .

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5. We apply the same rules of statutory construction in determining the meaning of state statutes. *See Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 206 Ariz. 1, 5, ¶ 10, 75 P.3d 91, 95 (2003) (citing *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996))("[W]e first look to the language of the statute itself. Our chief goal is to ascertain and give effect to the legislative intent."); *Calik v. Kongable*, 195 Ariz. 496, 498, ¶ 10, 990 P.2d 1055, 1057 (1999) (if statute is unambiguous we apply language without using other means of statutory construction); *Logan v. Forever Living Prods. Int'l, Inc.*, 203 Ariz. 191, 194, ¶ 10, 52 P.3d 760, 763 (2002)(when "plain language" analysis is insufficient to determine legislative intent we look to statute's policy or evil it was designed to address).

to come or be present." Webster's Third at 318; Random House College at 192. It can also mean to utter or cry out in a loud voice. Webster's Third at 318; Random House College at 192. Call can also mean "to criticize adversely" as in "she called him on his vulgar language." Webster's Encyclopedic Unabridged Dictionary 211 (1989). As a noun, "call" similarly has multiple meanings. For example, "the cry or vocal sound of a bird or other animal," or "a short visit." Random House Unabridged Dictionary 297 (2nd ed.1993).

¶15 Of course, call is also commonly associated with telephone use. In that context, when the word call is used as a verb, one if its most common meanings is to communicate or try to communicate with by telephone. *E.g.*, Webster's Third at 318 ("to communicate with or try to get into communication with a person by telephone"); Random House Unabridged at 297 ("to communicate or try to communicate with by telephone"); Random House Webster's College Dictionary 194 (1991) ("to communicate or try to communicate with by telephone"). And when used as a noun in that context, it often refers to the act or instance of calling on the telephone. Random House Unabridged at 297; Webster's Third at 318. In our view, given that the TCPA was designed to regulate the receipt of automated telephone calls, Congress used the word call to refer to an attempt to communicate by telephone. *See United States v. Amer. Trucking Assoc.*, 310 U.S. 534, 542-43, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940) (when words of a statute are susceptible to more than one meaning, courts are to interpret them in a matter which is reasonable given the subject matter of the statute and its purpose).

¶16 The TCPA does not limit the attempt to communicate by telephone to two-way real time voice "intercommunication," as Acacia argues. As relevant here, the TCPA states it "shall be unlawful for any person . . . *to make any call* . . . using an automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service. . . ." 47 U.S.C. § 227(b)(1)(A)(iii)(emphasis added). It is the act of making a call, that is, of attempting to communicate to a cellular telephone number using certain equipment, that the TCPA prohibits. Whether the call had the potential for a two-way real time voice communication is irrelevant. Accordingly, we hold an attempt to communicate by telephone constitutes a call under the TCPA even if the attempted communication does not present the potential for two-way real time voice intercommunication.

¶17 Our conclusion that the word call is not restricted to the type of call described by Acacia is consistent with other language in the TCPA provisions at issue here. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). In addition to prohibiting calls by automatic dialing systems, the TCPA also prohibits any call using any artificial or prerecorded voice to a telephone number assigned to a cellular telephone service, or to a residential telephone line. 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B). A call made by an artificial or prerecorded voice has no potential for a real time voice intercommunication.

¶18 Our construction of the word call is also supported by the TCPA's legislative history. The Senate Report

accompanying the TCPA identified a litany of problems caused by the telemarketing industry's aggressive use of machines to make automated calls. S. Rep. No. 102-178, at 2. Congress viewed these calls as more of a nuisance and a greater invasion of privacy than calls placed by "live" people because, for example, automated calls failed to "respond to human voice commands to disconnect" or to "allow the caller to feel the frustration of the called party. . . ." *Id.* at 2, 4. Thus, one of the central purposes of the legislation was to protect the public from automated calls — calls made by machines without the potential for real time voice "intercommunication."

¶19 The parties have not cited, nor have we been able to find, any case law interpreting the TCPA provisions at issue here. One court has, however, interpreted another TCPA provision as prohibiting telephone solicitations that did not involve the potential for a real time voice communication. *See Irvine v. Akron Beacon Journal*, 147 Ohio App. 3d 428, 770 N.E.2d 1105 (2002). At issue in the *Irvine* case was 47 U.S.C. § 227(a)(3) of the TCPA, which defines the term "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of . . . goods . . . or services." Id. at 1118, ¶ 71.

¶20 In *Irvine*, the defendant used an autodialer to generate a telemarketing solicitation list. *Id.* at 1109, ¶ 8. The autodialer called numbers from a preprogrammed list of disconnected telephone numbers and, depending on the type of sound signal received, recorded which of the telephone numbers had been reconnected and were working. *Id.* As soon as the autodialer detected the sound signal, it recorded the

information and dropped the call. *Id.* The defendant asserted the calls were not telephone solicitations under the TCPA because no solicitors were on the calls when they were placed. *Id.* at 1118, ¶ 70. The court rejected the argument, stating there was "no language in the statute requiring that a conversation take place. . . ." *Id.* at ¶ 72. The court explained:

> This court is not persuaded by [defendant's] argument that the calls it generated by the autodialer, with no intention of connecting them to a telephone solicitor, did not qualify as "telephone solicitations." Whether a solicitor is at the other end of the phone or not, when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at the other end of the line.

Id. at 1119, ¶ 74. We find the reasoning of *Irvine* persuasive. There is no language in the TCPA that restricts calls to only those that present the potential for a voice communication. The TCPA's provisions at issue here apply to any type of call, voice or text.

21 For these reasons, we hold that a call subject to § 227(b)(1)(A)(iii) of the TCPA occurs when the caller has made an attempt to communicate by telephone, even if the attempt does not present the potential for a two-way voice intercommunication. A text message may constitute a call

subject to the TCPA if the other requirements of the statute are met.[6]

¶22 We thus come to what is really at the heart of Acacia's argument—even if the term call is not restricted to voice intercommunications, it nevertheless did not call Joffe because it simply sent e-mail to an e-mail address—conduct the TCPA does not prohibit. Acacia's description of what it did, however, is incomplete. To understand what Acacia actually did, which is subject to the TCPA, and what it says it did, requires a description of the technology involved in the transmission of its solicitations to Joffe, technology it adopted for its own commercial purposes.

¶23 SMS is a messaging system that allows cellular telephone subscribers to send and receive short messages (hence, the name) usually limited to 160 or so characters on their cellular telephones. An SMS message is a text message "directed to [a] wireless devic[e] through the use of the telephone number assigned to the device." *Notice of Proposed Rule Making in re Regulations Implementing the CAN-SPAM Act of 2003 and the TCPA*, 19 FCC Rcd. 5056, 2004 WL 547587 (2004) ("CAN-SPAM NPRM").[7] An SMS message

6. We note that in 2003, the FCC issued an order specifically stating the TCPA's prohibition on autodialed calls "encompasses both voice calls and text calls to wireless numbers including, for example short message service (SMS) calls. . . ." *Rules and Regulations Implementing the TPCA, Report and Order*, 18 FCC Rcd. 14014, 14115, ¶ 165, 2003 WL 21517853 (2003)("2003 TCPA Order").

7. Throughout this opinion we have cited to notices and orders issued by the FCC concerning the TCPA and the CAN-SPAM Act

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may be transmitted phone-to-phone and, as Acacia did here, Internet-to-phone. Many cellular telephone carriers provide their customers with SMS. *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 17 FCC Rcd. 12985, 13051-52, 2002 WL 1438562 (2002).

¶24 A phone-to-phone SMS message is, as its name suggests, a text message sent from one cellular telephone to another cellular telephone. The sender uses his cellular telephone to address a message to the recipient's cellular telephone number, and types the message on the cellular telephone's keypad. The text message then travels from the sending cellular telephone to the sender's carrier and then through the appropriate cellular telephone switch to the recipient's cellular telephone carrier who transfers it to the receiving cellular telephone. *See generally Heng Xu, Foundations of SMS Commerce Success*; *see also* CAN-

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(Cont'd)

that describe the technology involved in this case. The FCC's description of SMS, phone-to-phone SMS, and Internet-to-phone SMS is consistent with how this technology has been described in the marketplace. *See generally* Heng Xu, et al., *Foundations of SMS Commerce Success: Lessons from SMS Messaging and Co-opetition*, §§ 2.1, 2.2.3, http://www.hicss.hawaii.edu/HICSS36 /HICSSpapers/ DTMCC06.pdf (last visited Sept. 12, 2005); Institute of Electrical and Electronics Engineers, *SMS and MMS*, http://ewh.ieee.org/r10/ bombay/ news6/SMSAndMMS/SMS.htm (last visited Sept. 12, 2005); Telemetrix Inc., *GSM Network Access for your messaging needs*, http://www.tlxt. net/developer.html (last visited Sept. 12, 2005); Cingular, Text Messaging FAQs, http://www.cingular. com/ media/text_ messaging_faqs (last visited Sept. 12, 2005); Verizon Wireless, *How to Use Guide*: *TXT messaging*, http://dts.vzw. com/ pdf/HowTo_TXTmessaging.pdf (last visited Sept. 12, 2005).

SPAM NPRM, 19 FCC Rcd. at 5063, ¶ 15; 2003 TCPA Order, 18 FCC Rcd. at 14115 n.606. The Internet is not involved when an SMS message is sent phone-to-phone. CAN-SPAM NPRM, 19 FCC Rcd. at 5063, ¶ 15.

¶25 The Internet becomes involved, however, when an SMS message is transmitted Internet-to-phone. *Id.* The text message is initially delivered over the Internet as an e-mail directed to an e-mail address assigned by a cellular telephone carrier to a subscriber. *Id.* When the e-mail reaches the e-mail address, it is converted automatically by the carrier into a different format that can be transmitted to the customer's cellular telephone. *Id.* To illustrate: assume cellular telephone carrier "Wireless" has assigned to its customer cellular telephone number (123) 456-7890 and has also given its customer an e-mail address made up of the customer's cellular telephone number and Wireless' domain name, wireless.com. An e-mail sent to that e-mail address, 1234567890@wireless.com, will travel from the sender's computer over the Internet to Wireless' domain. After the e-mail arrives at Wireless' domain, pursuant to the particular SMS protocol used by Wireless, Wireless will automatically convert the text of the message into an SMS message and forward the SMS message to its customer's cellular telephone.[8] Thus, Wireless actually receives the e-mail, and

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8. In an interrogatory answer, Joffe described the Internet-to-phone delivery system as follows:

> The perception that a cellular phone can receive email is accomplished by the cellular phone's service provider performing an automated message translation. Stated

(Cont'd)

after processing it, directs the message to its customer's cellular telephone as an SMS message. *See generally* T-Mobile comments in response to CAN-SPAM NPRM at 5-6 (April 30, 2004), http://gullfoss2.fcc.gov/prod/ ecfs/ retrieve.cgi?native_or_pdf=pdf & id_document=6516182561 (last visited Sept. 12, 2005); Verizon Wireless comments in response to CAN-SPAM NPRM at 2-3 (April 30, 2004), http:/ /gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf= pdf & id_document=6516182468 (last visited Sept. 12, 2005).[9]

(Cont'd)

> simply, the content of the e-mail message is converted into a new message and format that the cellular telephone can understand, therefore the content of the message is delivered, but it can in no way be considered or construed as email. The provider's message center then directs the newly created message back out to the switch in the appropriate cell and the message is transmitted to the cellular telephone with the same conventions employed for all other cellular telephone communication.

Acacia did not dispute Joffe's description of Internet-to-phone SMS and, indeed, relied on his description of it in moving for partial summary judgment.

9. Although an Internet-to-phone SMS message includes an Internet domain name at the point the sender transmits it over the Internet, the domain name is not used when the message is delivered by the carrier to its customer. This is because, once the message reaches the carrier, it converts the message into an SMS message (without the Internet domain) for forwarding to the customer's cellular telephone. T-Mobile comments in response to CAN-SPAM NPRM at 6.

¶26 Whether a text message is sent phone-to-phone or Internet-to-phone, the end result is the same. The recipient's cellular telephone carrier forwards what is an SMS message to the recipient's cellular telephone.

¶27 Here, Joffe received two SMS messages from Acacia. Acacia used its computers to generate the messages and direct them to an e-mail address provided to Joffe by his carrier that was made up of Joffe's ten digit cellular telephone number and his cellular carrier's domain name. When Acacia's solicitations reached Joffe's carrier, it converted them into SMS messages and delivered them to Joffe's cellular telephone.

¶28 As is clear from the foregoing discussion, Acacia did not, as it contends, simply send e-mail to an e-mail address. Using its computers and the Internet, Acacia co-opted the SMS service offered by Joffe's carrier to deliver SMS text messages to Joffe by telephone. As the trial court correctly observed, Acacia "initiated a demand to make a connection . . . for the purpose of delivering a message by telephone encouraging the purchase of services or investment in a product offered" by it. In so doing, Acacia attempted to communicate by telephone. Under the TCPA, Acacia called Joffe.

B. Acacia Used an Automatic Dialing System to Call Joffe

¶29 Not every telemarketing call is subject to the TCPA. As relevant here, the TCPA is implicated only when the caller uses an automatic dialing system. The TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity--(A) to store or produce telephone numbers to be

called, using a random or sequential number generator, and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Acacia does not dispute its computers randomly or sequentially produced telephone numbers. Instead, it argues it did not contact Joffe by using equipment that called or dialed his cellular telephone number. The focus of its argument is that its computers simply sent e-mail to an e-mail address.[10]

¶30 But, as we have already discussed, Acacia did not simply send e-mail to an e-mail address. Acacia took advantage of a service offered by Joffe's carrier to reach Joffe's cellular telephone. Even though Acacia used an attenuated method to dial a cellular telephone number, it nevertheless did so.

¶31 Although the technology Acacia used to deliver the SMS messages to Joffe's cellular telephone may not have existed in 1991 when the TCPA was enacted, the wording of the statute is not limited to 1991 technology. Congress prohibited calls made using "*any* automatic telephone dialing *system*." (Emphasis added.) Congress described such a

10. The TCPA does not define the word dial. Dial has many plain and ordinary meanings. *E.g.*, Webster's Ninth Collegiate at 349; Random House College at 366. For example, "a device (as a disk) that may be operated to make electrical connections or to regulate the operation of a machine and that usu[ally] has guiding marks around its border," Webster's Ninth at 349, or "a rotatable plate or disk," Webster's Encyclopedic Unabridged Dictionary 397 (1989). In the context of the phrase "to dial such numbers" the words "to dial" mean to "operate" or "manipulate" a device "in order" to make or establish a telephone call or connection. Webster's Ninth at 349; Random House College at 366; Webster's Third at 622; The New Shorter Oxford English Dictionary 660 (1993).

system in functional terms: "equipment which has the capacity—(A) to store or produce telephone numbers to be called . . . and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). This wording demonstrates Congress anticipated the TCPA would be applied to advances in automatic telephone dialing technology.

¶32 We are not alone in reaching this conclusion. In exercising its rulemaking authority under the TCPA, the FCC has reached the same conclusion. For example, in 2002, the FCC invited comment on whether new autodialing technologies could be included within the restrictions on automatic telephone dialing systems. *Notice of Proposed Rule Making in re Regulations Implementing the TCPA*, 17 FCC Rcd. 17459, 17473-74, ¶¶ 23-24, 2002 WL 31084939 (2002)("2002 TCPA Notice").[11] The FCC concluded the statutory definition of automatic dialing system included advances in technology: "[i]t is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." 2003 TCPA Order, 18 FCC Rcd. at 14092, ¶ 132.

¶33 As we have explained, Acacia took advantage of Internet-to-phone SMS technology—technology that

11. In seeking such comment, the FCC recognized "that in the last decade new technologies have emerged to assist telemarketers in dialing the telephone numbers of potential customers. More sophisticated dialing systems, such as predictive dialers and other electronic hardware and software containing databases of telephone numbers, are now widely used by telemarketers to increase productivity and lower costs." 2002 TCPA Notice, 17 FCC Rcd. at 17474, ¶ 24.

guaranteed its computer generated text messages would be delivered to Joffe's cellular telephone. By pairing its computers with SMS technology, Acacia did what the TCPA prohibits. It used an automatic telephone dialing system to call a telephone number assigned to a cellular telephone.

II. The CAN-SPAM Act

¶34 Despite the wording of the TCPA, Acacia argues the language, legislative history, and FCC implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), passed 12 years after the TCPA, demonstrate Congress intended the CAN-SPAM Act and not the TCPA to apply to the messages it sent to Joffe's cellular telephone. Pub.L. No. 108-187, 117 Stat. 2699 (2003), codified at 15 U.S.C. §§ 7701-7713, 18 U.S.C. § 1037 and 28 U.S.C. § 994 (Supp. 2005). We disagree.

¶35 The CAN-SPAM Act, which became effective on January 1, 2004, was enacted to protect consumers from unwanted commercial e-mail, known colloquially as "spam." It imposes a number of restrictions on the sending of commercial e-mail, defined as messages that have as their primary purpose a commercial advertisement or a promotion of a commercial product or service. The CAN-SPAM Act also contains a section concerning unwanted messages to wireless devices, such as cellular telephones. Specifically, § 14(b), codified as 15 U.S.C. § 7712(b), directed the FCC to issue rules protecting consumers from "unwanted mobile service commercial messages," or "MSCMs." An MSCM is a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service (as such

term is defined in [47 U.S.C. § 332(d)(1) (2004)][12]) in connection with such service." 15 U.S.C. § 7712(d). The legislative history of the CAN-SPAM Act reflects § 14 was inserted into the statute to address unwanted text messages sent to wireless devices including cellular telephones. Indeed, certain members of the House described this section of the CAN-SPAM Act as being the "first step" toward prohibiting such messages. 140 Cong. Rec. H12193, H12194, and H1298 (daily ed. Nov. 21, 2003) (statements of Reps. Markey, Dingell, Holt). Neither § 14 nor these comments, however, demonstrate Congress intended the CAN-SPAM Act, and only the CAN-SPAM Act, to apply to unsolicited text messages.

¶36 First, Congress contemplated the CAN-SPAM Act and the TCPA could have dual applicability. Section 14(a) specifically states "[n]othing in this Act shall be interpreted to preclude or override the applicability of [the TCPA]. . . ." 15 U.S.C. § 7712(a).

¶37 Second, although certain members of Congress may have thought the CAN-SPAM Act was the first legislation to attack unwanted text messages sent to wireless devices, their perceptions, stated years after the passage of the TCPA, fail to demonstrate the TCPA was inapplicable to the text messages Acacia delivered to Joffe. None of them mentioned the TCPA and none of them expressed any opinion about its applicability to text messages.

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12. 47 U.S.C. § 332(d)(1) defines "commercial mobile service" as "any mobile service that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the [FCC]." The FCC interprets commercial mobile service to include wireless carriers. CAN-SPAM NPRM, 19 FCC Rcd. at 5016-62, ¶ 9.

¶38 As the Supreme Court has repeatedly instructed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *E.g.*, *United States v. Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334 (1960). This is especially true when the subsequent legislative history consists of statements made by individual legislators as to what they believe the prior legislation meant.

> Such [subsequent] history does not bear strong indicia of reliability, however, because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980). This holds true even when a later Congress passes legislation to address actions it believes fall outside the scope of earlier legislation. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 349, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963).

¶39 We also do not agree, as Acacia suggests, that in adopting rules pursuant to § 14 of the CAN-SPAM Act, the FCC took the position the language of the TCPA is not broad enough to encompass Internet-to-phone SMS calls. As noted above, under the CAN-SPAM Act, an MSCM is a commercial electronic mail message "transmitted directly to a wireless device." After requesting and receiving public comment on how it should interpret and apply this language in its proposed

rules,[13] the FCC concluded MSCMs should include any commercial electronic mail message as long as it is sent or delivered to an address that includes a reference to an Internet domain. *Rules and Regulations Implementing the CAN-SPAM Act of 2003 and the TCPA*, 19 FCC Rcd. 15927, 15933, ¶ 16, 2004 WL 1794922 (2004) ("CAN-SPAM Order"). Accordingly, the FCC has decided to include Internet-to-phone SMS messages as messages covered by § 14 of the CAN-SPAM Act because they are initially directed to an address that contains an Internet domain reference. *Id.*[14]

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13. In requesting comment the FCC stated:

> SMS messages are text messages directed to wireless devices through the use of the telephone number assigned to the device. When SMS messages are sent between wireless devices, the messages generally do not traverse the Internet and therefore do not include a reference to an Internet domain. However, a message initially may be sent through the Internet as an electric mail message, and then converted by the service provider into an SMS message associated with a telephone number. We seek comment on whether the definition of an MSCM should include messages using such technology and similar methods, and specifically whether it should include either or both of these types of SMS messages described above. We note here that the TCPA and the Commission rules prohibit calls using autodialers to send certain voice calls and text calls, including SMS messages, to wireless numbers.

CAN-SPAM NPRM, 19 FCC Rcd. at 5063-64, ¶ 15 (footnotes omitted).

14. In its order implementing rules pursuant to § 14, the FCC stated:

> We conclude that the definition of MSCM under the CAN-SPAM Act includes any commercial electronic mail

(Cont'd)

¶40 Although the FCC has elected to regulate Internet-to-phone SMS under the CAN-SPAM Act, notably absent in the FCC's order implementing the CAN-SPAM rules is any statement or suggestion that the language of the TCPA is not sufficiently broad to apply to Internet-to-phone SMS calls. Simply put, the FCC's decision in 2004 to regulate prospectively Internet-to-phone SMS messages under the CAN-SPAM Act does not mean the TCPA is inapplicable to the Internet-to-phone SMS calls made by Acacia in 2001 to Joffe's cellular telephone. Moreover, even if the FCC had taken that position, we would be left with the CAN-SPAM Act's plain language that it shall not "be interpreted to preclude or override the applicability" of the TCPA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Bd. of*

(Cont'd)

> message as long as the address to which it is sent or transmitted includes a reference to the Internet and is for a wireless device as discussed above. This holds true regardless of the format of the message, such as audio messages. We believe this interpretation best applies the statutory language to the evolving technology for delivering such messages. Therefore, messages sent using Internet-to-phone SMS technology are among messages covered by section 14 when they include an Internet reference in the address to which the message is sent or delivered.

CAN-SPAM Order, *19 FCC Rcd. at 15933-34*, ¶ *16*. Because phone-to-phone SMS messages do not reference Internet domains, they are not "captured by section 14. . . ." *Id.* at ¶ 17. Such calls are subject to the TCPA. *See supra* note 6.

Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368, 106 S. Ct. 681, 88 L. Ed. 2d 691 (1986)("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.").

¶41 Application of the TCPA to Internet-to-phone SMS messages does not render the CAN-SPAM Act's regulation of such messages superfluous. Section 7712 of the CAN-SPAM Act is broader than the TCPA. The CAN-SPAM Act applies to all uninvited MSCMs. In contrast, the TCPA applies to only those calls made using an automated dialing system or an artificial or prerecorded voice.

¶42 We conclude, therefore, that nothing in the wording, legislative history or FCC implementation of the CAN-SPAM Act demonstrates Congress intended only the CAN-SPAM Act, and not the TCPA, to apply to the SMS text message calls Acacia made to Joffe.

III. The TCPA Does Not Violate the First Amendment

¶43 Acacia finally argues the TCPA violates its rights under the First Amendment to the United States Constitution. We have a duty, when possible, to read statutes in a manner that avoids constitutional invalidation. *Zadvydas v. Davis*, 533 U.S. 678, 689, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). The parties agree the TCPA creates a content-neutral time, place, and manner restriction on speech. Such a restriction survives a First Amendment challenge if it serves "a significant governmental interest," is "narrowly tailored" to serve that interest, and leaves "open ample alternative channels

for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)(quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Applying these standards, we hold the TCPA does not violate Acacia's First Amendment rights.

¶44 The thrust of Acacia's argument is Congress did not articulate any applicable governmental interest because it could not have anticipated SMS messaging technology and thus did not actually consider whether the TCPA could apply to Internet-to-phone SMS. But, as we have discussed, Congress intended the TCPA to apply to advances in automatic telephone dialing technology and to the use of that technology to disrupt the privacy of residential (and business) telephone subscribers.

¶45 Protecting the privacy of the home from unwarranted and unrequested intrusions constitutes a significant governmental interest. *E.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (municipal ordinance construed as banning targeted picketing in front of a particular residence serves significant governmental interest of protecting residential privacy). In enacting the TCPA, Congress recognized exactly that:

> The Supreme Court has recognized the legitimacy of reasonable time, place and manner restrictions on speech when the restrictions are not based on the content of the message being conveyed. In 1948, the Court upheld an ordinance banning sound trucks. *Kovacs v. Cooper*, 336 U.S. 77, 69

> S. Ct. 448, 93 L. Ed. 513 (1948). The Supreme Court also has recognized that "in the privacy of the home ... the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Found.*, 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). The case upheld an FCC ruling that prohibited the daytime broadcast of indecent language.

S. Rep. No. 102-178, at 4, (1991 U.S.C.C.A.N. 1968, at 1971 added). Cellular telephones have permeated American life, and have replaced traditional "land line" telephones in many homes and businesses. People keep their cellular phones on their person at nearly all times: in pockets, purses, and attached to belts. Unlike other modes of communication, the telephone commands our instant attention. While junk mail may be thrown away unopened, and television commercials turned off, the telephone demands to be answered. In protecting the privacy of cellular telephone subscribers from automated calls, the TCPA serves a significant governmental interest.

¶46 Second, the TCPA is narrowly tailored to serve the governmental interest identified by Congress. In the realm of content-neutral speech restrictions, a statute is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately

served by some less-speech-restricted alternative." *Id.* at 800, 109 S. Ct. 2746. Through the TCPA, Congress sought to address consumer concerns about telephone solicitations, and in particular, automated calls that burden consumers. By prohibiting only those calls from automatic dialing systems, Congress narrowly tailored the TCPA to achieve this goal in a way not substantially broader than necessary.

¶47 Finally, Congress left open many alternative modes of communicating with consumers. For example, the TCPA restricts only calls using automatic telephone dialing systems or a prerecorded voice. Thus, Acacia could have sent its messages by entering the numbers it wished to reach by hand. Other examples include live solicitation calls, and autodialed calls consumers consent to receiving. *See Moser v. FCC*, 46 F.3d 970, 975 (9th Cir.1995).

¶48 Therefore, application of the TCPA's restriction on autodialed calls to cellular telephones, including the Internet-to-phone SMS calls at issue here, is narrowly tailored to serve the significant and content-neutral governmental interest of protecting consumer privacy from unsolicited telemarketing calls. As applied to Acacia's conduct, the TCPA did not violate its rights under the First Amendment.

Appendix A

CONCLUSION

¶49 By using an automatic dialing system to make Internet-to-phone SMS calls to Joffe's cellular telephone, Acacia violated § 227(b)(1)(A)(iii) of the TCPA. Because the TCPA is a content-neutral regulation narrowly tailored by Congress to further a significant governmental interest, the TCPA does not violate Acacia's First Amendment rights. Accordingly, we affirm the superior court's order granting Joffe partial summary judgment.

s/ Patricia K. Norris
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

s/ Jefferson L. Lankford
JEFFERSON L. LANKFORD, Judge

s/ John C. Gemmill
JOHN C. GEMMILL, Judges.

APPENDIX B — DECISION AND ORDER JUDGMENT OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY DATED SEPTEMBER 9, 2002 AND FILED SEPTEMBER 13, 2002

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/09/2002

HON. GARY E. DONAHOE

CV 2001-009399

RODNEY L JOFFE

v.

ACACIA NATIONAL MORTGAGE CORPORATION, et al.

DECISION AND ORDER
JUDGMENT

Pending before the Court are (1) Acacia Mortgage Corporation's Motion for Summary Judgment or, in the alternative, Motion for Reconsideration, (2) Plaintiff's Cross-Motion for Summary Judgment, (3) Plaintiff's Motion to Amend Complaint, (4) Plaintiff's Motion to Certify Class Action, and (5) Defendants' Motion to Stay Proceedings on Plaintiff's Motion to Amend Complaint and Motion to Certify Class Action. The Court notes that Plaintiff's cross-motion for summary judgment has been withdrawn as to Defendant Gerald Youhanaie. The Court has considered the pleadings.

IT IS HEREBY ORDERED denying Acacia Mortgage Corporation's Motion for Summary Judgment or, in the alternative, Motion for Reconsideration for the reasons stated in this Court's March 6, 2002 minute entry. In addition, based on *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1994) as well as the reasons set forth in Plaintiff's response, the Court rejects Acacia Mortgage Corporation's contention that the Telephone Consumer Protection Act is unconstitutional.

IT IS FURTHER ORDERED granting Plaintiff's Cross-Motion for Summary Judgment and entering judgment in favor of Plaintiff and against Defendant Acacia Mortgage Corporation on liability only.

IT IS FURTHER ORDERED that this ruling and the Court's March 6, 2002 ruling constitute a final determination of the rights of Defendant Acacia Mortgage Corporation as to liability, leaving open only the amount that Plaintiff is entitled to recover from Defendant Acacia Mortgage Corporation.

Anticipating that the liability ruling will be appealed,

IT IS FURTHER ORDERED granting Defendants' Motion to Stay Proceedings on Plaintiff's Motion to Amend Complaint and Motion to Certify Class Action for thirty days from the "filed" date appearing above. Should a notice of appeal not be timely filed, Plaintiff's counsel should advise the Court and the Court will proceed with Plaintiff's Motion to Amend Complaint and Plaintiff's Motion to Certify Class Action.

Appendix B

Finding no just reason for delay for entry of judgment,

IT IS FURTHER ORDERED directing the Clerk of the Court to enter this judgment without delay.

Because the parties are in agreement with respect to the Court entering a final order, the Court signs this as its judgment with the time for appeal to run from the "filed" date appearing above.

/s/ Gary E. Donahoe
Hon. Gary E. Donahoe
Judge of the Superior Court

APPENDIX C — MINUTE ORDER OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY DATED MARCH 6, 2002 AND FILED MARCH 8, 2002

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

03/06/2002

HON. GARY E. DONAHOE

CV 2001-009399

RODNEY L JOFFE

v.

ACACIA NATIONAL MORTGAGE CORPORATION, et al.

MINUTE ENTRY

8:30 a.m. This is the time set for oral argument on Defendants' Motion for Summary Judgment. Present are Steven M. Rudner, counsel for Plaintiff, and Salvador Ongaro, counsel for Defendants.

Court reporter, Troy Kelley, is present.

The proceeding is recorded on the court's electronic recording system.

Counsel present argument on the motion.

Appendix C

IT IS HEREBY ORDERED taking the motion under advisement.

Later

Based on consideration of the pleadings and the argument of counsel, the Court finds and concludes as follows:

By using an e-mail address composed primarily of a telephone number, Defendants initiated a telephone message to a telephone number assigned to a cellular telephone service. By this method, Defendants initiated a demand to make a connection to Plaintiff's cellular telephone for the purpose of delivering a message by telephone encouraging the purchase of services or investment in a product offered by Defendants. By doing advertising in this manner, Defendants shifted some of the cost of its advertising to those receiving the telephone calls. The Court is of the opinion that such conduct violates the Telephone Consumer Protection Act. Therefore,

IT IS HEREBY ORDERED denying Defendants' Motion for Summary Judgment.

APPENDIX D — DECISION OF THE SUPREME COURT OF ARIZONA DENYING PETITION FOR REVIEW DATED MAY 23, 2006

SUPREME COURT
STATE OF ARIZONA

May 25, 2006

RE: RODNEY L JOFFE v ACACIA MORTGAGE CORPORATION
Arizona Supreme Court No. CV-05-0399-PR
Court of Appeals Division One No. 1 CA-CV 02-0701
Maricopa County Superior Court No. CV 01-009399

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 23, 2006, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Hurwitz did not participate in the determination of this matter.

APPENDIX E — STATUTE INVOLVED

47 U.S.C.A. § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent

of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

Appendix E

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

Appendix E

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

Appendix E

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv)

permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-

exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within

a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Appendix E

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification,

in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other

activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any

automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial

or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

Appendix E

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the

district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(g) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

Supreme Court U.S.
FILED

No. 06-408

IN THE

Supreme Court of the United States

ACACIA MORTGAGE CORPORATION,

Petitioner,

v.

RODNEY L. JOFFE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

BRIEF IN OPPOSITION

STEVEN M. RUDNER
Counsel of Record
JOHN C. JOSEFSBERG
RUDNER LAW OFFICES
5001 Spring Valley Road
Suite 225E
Dallas, Texas 75224

Attorneys for Respondent

204976

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Petitioner Acacia Mortgage Corporation ("Acacia") has presented no "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. This case involves the application of the Telephone Consumer Protection Act ("TCPA"), codified at 47 U.S.C. § 227 *et seq.*, to Acacia's admitted conduct. Acacia programed its computer to send promotional e-mail messages to cell phone users, knowing with absolute certainty that these messages would reach their targets and result in cell phone calls. When Respondent Rodney Joffe's ("Joffe") cell phone rang on January 6, 2001, and again on March 21, 2001, he unhappily discovered that Acacia was sending its intrusive text messages to his cell phone. [Pet. App. at 2a] When Acacia brazenly refused to stop sending these messages, Mr. Joffe filed suit.

This case is not now, nor has it ever been, about the applicability of the TCPA to e-mails sent to computers. Acacia knew that its promotional text messages would not end up on Mr. Joffe's personal computer as e-mails.[1] Acacia knew this because its text messages were sent to an e-mail address comprised primarily of Mr. Joffe's cell phone number, 6024186471@att.net. Although initiated as e-mails, Acacia also knew that Mr. Joffe's cellular telephone provider would convert them into text messages that would be delivered

1. The text messages Acacia sent to Mr. Joffe's cell phone are known as "SMS messages." An SMS message is a text message "directed to [a] wireless devic[e] through the use of the telephone number assigned to the device." [Pet. App. 13a] An SMS Message may be transmitted phone-to-phone or, as Acacia did to Mr. Joffe, Internet-to-phone. [*Id.*] An Internet-to-phone text message is initially delivered over the Internet as an e-mail directed to an e-mail address assigned by a cellular telephone carrier to a subscriber. [*Id.* at 13a-14a] When the e-mail reaches the e-mail address, it is converted automatically by the carrier into a different format that can be transmitted to the customer's cellular telephone." [*Id.* at 15a]

directly to Mr. Joffe's cellular telephone as calls. Acacia knew that Mr. Joffe was not going to receive its promotional messages by accessing his personal computer e-mail account via his cell phone. Instead, they were going to be foisted upon Mr. Joffe surreptitiously in the form of text message phone calls, just as Acacia intended. As the court of appeals described it, "Acacia co-opted the SMS service offered by Joffe's carrier to deliver SMS text messages to Joffe by telephone." [Pet. App. 17a]

Acacia's argument that it only sent e-mails to Mr. Joffe and did not make any "calls" elevates form over substance. Far from "ignoring" the plain meaning of the TCPA and expanding it into something Congress never intended, the trial court applied the letter and spirit of the law to Acacia's admitted conduct. In an 11-page published decision, a unanimous court of appeals affirmed. *See Joffe v. Acacia Mortgage Corp.*, 462 Ariz. Adv. Rep. 38, 121 P.3d 831 (2005) ("Opinion") [Pet. App. 1a - 29a]

The court of appeals based its decision on a thorough review of the legislative history of the TCPA, the FCC rules and regulations implementing the TCPA, and a textual analysis of the TCPA. After systematically addressing all of the elements necessary to establish a TCPA violation, the court of appeals concluded that Mr. Joffe satisfied those requirements. The Arizona supreme court declined to review the court of appeals' decision, and Acacia subsequently filed its Petition for a Writ of Certiorari with this Court.

Although the court of appeals correctly decided the legal issues, this Court does not need to reach the merits of the case in order to conclude that the Petition should not be granted. As detailed below, the Opinion does not have prospective application (the calls Acacia made are now governed by a completely different statutory scheme) and the limitations period for bringing claims under the TCPA for using an autodialer to send text messages to cell phone

users is closing. With such limited application, the Court would be constrained to conclude that this case involves an "important issue."

Simply put, Petitioner has failed completely to carry its burden of demonstrating that there are compelling reasons for this Court to grant the Petition.

STATEMENT OF THE CASE

Respondent generally adopts as its statement the Arizona court of appeals' recitation of the background facts. [Pet. App. at 1a-5a]

REASONS FOR DENYING THE PETITION

I. This Case Does Not Involve An "Important Issue." Calls Such As The Ones Acacia Made To Mr. Joffe's Cell Phone Are Now Governed By The CAN-SPAM Act, And The Limitations Period For Bringing Claims Under The TCPA For Such Calls Is Closing

Referencing the number of times the TCPA has been the subject of judicial decisions, law review articles and trade publications, together with the fact that this case is one of first impression, Acacia contends that this case involves "an important issue of first impression regarding the operation of a federal statute." [Petition at 6] Acacia is mistaken.

Since January 1, 2004, calls such as the ones Acacia made to Mr. Joffe's cell phone are governed by the CAN-SPAM Act. The court of appeals interpreted an entirely different statute (the TCPA) and held that calls such as the ones made by Acacia to Mr. Joffe's cell phone violate the TCPA. Further, the limitations period for asserting claims based on calls that were made before the CAN-SPAM Act went into effect is rapidly closing.[2] Because

2. When a federal statute does not contain a built-in statute of limitations, the four-year statute of limitations under 28 U.S.C. § 1658 applies.

the court of appeals Opinion does not apply to the existing regulatory scheme for such calls, and since the class of plaintiffs that may still assert claims under the TCPA is dwindling, the case is one of obvious limited significance. The Petition should denied for this reason alone.

II. The Court of Appeals Opinion Does Not Threaten To "Interfere" With Congress' "Carefully-Designed Regulatory Scheme"

Acacia is obviously free to challenge the Opinion on the basis that its conduct is not covered by the TCPA or that the interpretation given to the TCPA by the court of appeals runs afoul of the First Amendment. However, Acacia's assertion that the Opinion "interferes with Congress's attempt to regulate carefully and deliberately in the field of commercial communication" [Petition at 8] is so misplaced that one can only wonder why it is being made at all.

Effective January 1, 2004, calls such as the ones Acacia made to Mr. Joffe are governed by the CAN-SPAM Act. The unwanted calls Acacia made to Mr. Joffe ' cell phone all occurred before January 1, 2004. The court of appeals held that the calls Acacia made to Mr. Joffe, all of which occurred prior to January 1, 2004, violate the TCPA. The Opinion does not have prospective application and has no impact whatsoever on the CAN-SPAM Act. Since the Opinion does not apply to calls governed by the CAN-SPAM ACT, it can hardly "interfere" with it.

III. The Court Of Appeals Correctly Concluded That Acacia Made Prohibited "Calls" To Mr. Joffe

A. The TCPA

By concluding that the TCPA prohibits telemarketers from sending commercial text messages to cell phone users such as Mr. Joffe, the court of appeals properly applied the letter and spirit of the law.

Enacted in 1991 as part of the Federal Communication Act, the TCPA seeks to deal with an increasing common nuisance — telemarketing. *See Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3rd Cir. 1998). The TCPA prohibits various uses of automatic telephone dialing systems, live unwanted commercial telephone solicitation, and the use of any device to send an unsolicited advertisement to a telephone facsimile machine. *Id.* The statute creates a private right of action against any person that violates its provisions. 47 U.S.C. § 227(b)(3). The TCPA is a strict liability statute, pursuant to which a plaintiff can recover actual damages or statutory damages of $500 per violation, whichever is greater. 47 U.S.C.§ 227(b)(3). If the violation was done "willfully" or "knowingly," the court may treble the damages. *Id.*

B. Its Purpose

A central purpose of the TCPA is to prevent advertisers from shifting costs to recipients of unwanted solicitations, *see* H.R. Report No. 317, 102nd Cong., 1st Sess. 25 (1991), to protect consumers from unwanted telephone solicitation, *see id.*, and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers. *See* 47 U.S.C.A. § 227. Congress articulated another important purpose – the risk to public safety when an emergency line is seized by telemarketers.

The TCPA also furthers another important interest — the right to be left alone. *See* Rita Marie Cain, *Call Up Someone and Just Say "Buy" — Telemarketing and the Regulatory Environment*, 31 Am. Bus. L.J. 641, 649 (1994); *see also* U.S.C.C.A.N. 1968, 1979, accompanying S.1462 ("this legislation is designed for the laudable purpose of protecting the privacy rights of telephone users.") (President Bush); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1108 (N.J. Super. 1995) (same). The TCPA's Author, Senator Hollings, aptly addressed the privacy concerns underlying the TCPA:

> Mr. President, I rise today to urge the Senate to approve S. 1462, the Automated Telephone Consumer Protection Act. The substitute amendment before the Senate addresses an enormous public nuisance. Computerized telephone calls are invading our homes and destroying our privacy. Consumers around the country are crying out for Congress to put a stop to these computerized telephone calls. Congress has a clear opportunity to protect the interests of our citizens, and we should not pass up this chance. Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall. Even more important, these computerized telephone calls threaten our personal health and safety .. . Computerized calls tie up the emergency line of police, fire, and medical services and prevent real emergency calls from getting through. These machines are out of control, and their use is growing by 30 percent every year. It is telephone terrorism, and it has got to stop.

137 Cong. Rec. S16204-01, S16205.

C. Its Reach

1. The TCPA's Ban On the Use Of Automatic Telephone Dialing Systems For Calling Cellular Phone Users

Mr. Joffe's claims are based upon Section 227(b)(1)(A)(iii) of the TCPA, which makes it unlawful for any person within the United States to:

> make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any

> automatic telephone dialing system[3] or an artificial or prerecorded voice ... to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii).

2. The FCC Regulations Implementing The TCPA

The FCC has issued the following regulation regarding the use of automatic telephone dialing systems:

> (a) No person may:
>
> > (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,
> >
> > > (iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

47 C.F.R. § 64.1200(a)(1)(iii).

---

3. Acacia does not challenge the court of appeals' conclusion that the computer Acacia used to send its text messages to Mr. Joffe's cell phone fits within the statutory definition of an "automatic telephone dialing system" under Section 227(a)(1) of the TCPA.

IV. Acacia's Admitted Activities Are Governed By The TCPA

A. Acacia "Initiated" Prohibited Telephone Calls To Mr. Joffe's Cellular Telephone

The TCPA is not limited to those who actually dial phone numbers or make telephone calls. Rather, it includes those who "initiate" a "telephone call" or "message" for the purpose of engaging in prohibited telemarketing activities. 47 C.F.R. § 64.1200(a)(1)(iii). The TCPA does not define the word "initiate." However, its meaning cannot reasonably or logically be interpreted to cover only the act of dialing telephone numbers or making telephone calls.

A cardinal principle of statutory construction requires a court to interpret a statute, whenever possible, so that no clause, sentence, or word is rendered superfluous, void, contradictory, or insignificant. *E.g.*, *Samsel v. Allstate Ins. Co.*, 199 Ariz. 480, 483, 19 P.3d 621, 624 (App. 2001). To interpret the statute as proscribing only the act of physically dialing telephone numbers or making telephone calls would render superfluous the text of the statute, which not only prohibits any person from engaging in such activities, but also from "initiating" them.

Another well known cannon of statutory construction is that the plain meaning of words is to be given to a statute when construing its terms. This familiar cannon applies to the TCPA. *Autoplex Leasing, Inc. v. Mfr.*, 16 S.W.2d 815, 817 (Tx. App. 2000); *Zelma v. Total Remodeling, Inc.*, 756 A.2d 1091, 1093 (N.J. Super. 2000). While no Arizona court has been asked to construe the TCPA, it is clear that an Arizona court would apply the same principles of statutory construction. *See HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364, 18 P.3d 155, 158 (App. 2001) (words are given their ordinary meaning unless the context of the statute requires otherwise). Indeed, the

preferred approach in Arizona is to apply the ordinary meaning of the word found in well-respected dictionaries. *See Snyder v. Tucson Police Pub. Safety*, 201 Ariz. 137, 140, 32 P.3d 420, 423 (applying definitions found in Webster's Third New Int'l Dictionary and Black's Law Dictionary); *see also State v. James*, 141 Ariz. 141, 144, 685 P.2d 1293, 1296 (applying the word "initiate" in the context of an accused's right to counsel in its "ordinary dictionary sense").

Webster's defines "initiate" as "to begin, set going, or originate: to initiate major social reforms." Random House Webster's College Dictionary 678 (2nd ed. 1999). The word "initiate" is defined in Black's Law Dictionary as "commence; start; originate; introduce; inchoate." Black's Law Dictionary 705 (6th ed. 1990). "Initiation of proceedings" is defined as: "[T]he person who sets the machinery of the law in motion, whether he acts in his own name or in that of a third person." Restatement (Second) of Torts § 674 cmt. A.

By sending an e-mail to a known 9 digit cell phone number beginning with Area Code 602, Acacia placed into motion a course of events which was certain, and known to be certain, to result in a phone call. Under any reasonable definition, Acacia "initiated" phone calls to Mr. Joffe's cell phone.

B. The Person Or Entity "On Whose Behalf" Prohibited Calls Are Made Are Liable Under the TCPA

The TCPA applies not only to the entity making or "initiating" prohibited calls, but also to any entity "on whose behalf" such calls are made. *Worsham v. Nationwide Ins. Co.*, 772 A.2d 868, 878 (Md. 2001) (citing 47 U.S.C. § 227(c)(5) (providing private remedy for repeat calls "made by or on behalf" of the same entity).

Acacia cannot reasonably deny that the promotional phone calls Mr. Joffe received were made on its behalf. Simply put, Acacia cannot escape liability under the TCPA by asserting that it did not itself dial telephone numbers or make phone calls.

C. The Ban On The Use Automatic Telephone Dialing Systems To Make Calls To Cellular Telephones Cannot Reasonably Be Construed To Extend Only To Calls Which Involve "The Transmission Of Voice Or Sound"

Acacia erroneously contends that a prohibited "call" under the TCPA requires "the transmission of voice or sound." [Petition at 10] Acacia's flawed interpretation directly conflicts with FCC rules and regulations implementing the TCPA. It is also an internally inconsistent and demonstrably incorrect.

1. Acacia's Position Is Contrary To FCC Rules and Regulations Interpreting the TCPA

After the enactment of the CAN-SPAM Act, the FCC issued an Order which provides that auto-dialed phone-to-phone text messages ("SMS messages") would continue to be covered by the TCPA while SMS messages sent to cell phones through the Internet would be covered by the CAN-SPAM Act. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Report and Order, 18 F.C.C.R. 14, ¶ 165 (Jul. 3, 2003). If, as Acacia contends, the TCPA only applies to calls which involve "the transmission of voice or sound," SMS messages would not be covered by the TCPA. As SMS messages *are* covered by the TCPA, Acacia's position cannot possibly be correct.

For the same reason, Acacia's contention that the Opinion "interferes with Congress's attempt to regulate carefully and

deliberately in the field of commercial communication" [Petition at 8] is equally misplaced. It is this very same "carefully" regulatory scheme that expressly defines a "call" under the TCPA (in the TCPA Order discussed above) to include pure text messages.

2. Acacia's Unreasonable Interpretation Of The TCPA

For many reasons, the construction of the word "call" cannot reasonably be limited to "voice" transmissions under the TCPA. The drafter's of the TCPA carefully chose to use the word "voice" throughout the statute.[4] If the drafters wanted the word "call" to be limited to "voice" communications, they could have, and presumably would have, done so. *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988); *In re Pudgie's Development of NY, Inc.*, 239 B.R. 688, 695 (S.D.N.Y. 1999); *Hirschey v. F.E.R.C.*, 760 F.2d 305, 308 ("Congress knew how to use words of limitation when they were intended"); *Grado v. Gross*, 1984 WL 2467, *6 (D. Mass. 1984) ("It is worth noting that Congress knew how to use this word, in this statute, when it wished to."); *United States v. Donovan*, 429 U.S. 413, 445 (1977) ("Since Congress demonstrably knew how to use other language when it so chose, I would take Congress at its word and not try to "improve" on its draftsmanship.") (Brennan, J., concurring).

Moreover, Acacia's interpretation of the TCPA contravenes established principles of statutory construction and is unreasonable. Consumer protection legislation, such as the TCPA, are remedial statutes that "are broadly construed to effectuate their purpose and to promote justice." *E.g.*, *Parkhill v. Minnesota Mut. Life Ins. Co.*, 995 F. Supp. 983, 998 (D. Minn. 1998); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974);

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4. In fact, the word "voice" appears six times in the statute.

Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3rd Cir. 1975); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973); *cf Stainless Specialty Mfg. Co. v. Industrial Com'n of Arizona*, 144 Ariz. 12, 16, 695 P.2d 261, 265 (1985) (construing no-fault workers' compensation statute to give effect to its remedial purpose); *see also Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950) (consumer protection statutes "should be liberally construed and interpreted in a manner tending to discourage attempted evasions by wrongdoers"); *Hogar Agua v Vida En El Desierto, Inc.*, 36 F.3d 177, 182 (1st Cir. 1994) (exemptions from the requirements of remedial statutes are to be construed narrowly to limit exemption eligibility); *Georgia Pub. Serv. Com'n v. ALLTEL Georgia Communications Corp.*, 489 S.E.2d 350, 387 (Ga. App. 1997) ("Construction of a statute must square with common sense and reasoning. . . . We are not prone to condone the intentional [or inadvertent but flagrant] circumvention of the clear legislative purpose of protective statutes.")

As stated above, a central purpose of the TCPA is to protect consumers against unwanted telephone solicitations and to prevent such solicitors from shifting advertising costs to the consumer. To exempt text message solicitations sent to cell phone users because they are not "voice" communications, knowing that the consumer's phone will ring and that the consumer will be charged for the call, would be to disregard the purpose of the statute.

Courts also avoid construing statutes in such as way as to elevate form over substance, thus defeating the purpose of the statute. *See Gregory v. Helvering*, 293 U.S. 465, 470 (1935) (rejecting statutory interpretation that "exalt[s] artifice above reality and . . . deprive[s] the statutory provision in question of all serious purpose."); *Clark v. Rent-It-Corp.*, 685 F.2d 245, 248 (8th Cir. 1982) (stating that the Truth In Lending Act "is remedial in nature, and the substance rather than the form of credit transactions should be examined in

cases arising under it"); *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*, 35 F. Supp.2d 1042, 1047 (M.D. Tenn. 1999) (Congress' intent to preempt all equivalent state causes of action should not be defeated by a triumph of form over substance); *Baker v. Citibank (South Dakota) N.A.*, 13 F. Supp.2d 1037, 1046 (S.D. Cal. 1998) (rejecting statutory interpretation that "circumvents the statute's obvious purpose of protecting consumers). As one federal court put it, "[I]f it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." *BMC Ind., Inc. v. Barth Ind., Inc.*, 160 F.3d 1322, 1337 (11th Cir. 1998).

To accept Acacia's unreasonable interpretation would not only elevate form over substance, but would also circumvent the express legislative intent of Congress to protect consumers from unwanted telephone solicitation and the cost-shifting associated with such calls.

Further, with the advent of flat rate plans for cell phone users, more consumers are using their cell phones not only as their primary phones, but as their only ones. *See Union Ink Co., Inc. v. AT &T Corp.*, 801 A.2d 361 (N.J. Super. Ct. 2002). In fact, the United States Telecom Association reports that "1 in 5 Americans consider their cell phones as their primary phones." David Cohen & Edward D. Kania, *The Future of the Communications Industry: New Products, New Services, the Need For New Regulatory Paradigms*, 13 Comm Law Conspectus 1, 4 (2005). In addition, "it is estimated that 38% of Americans are considering making wireless their only phone service." Nicole B. Stach, *Wireless Local Number Portability and Its Effect On Competition: Can There Be Too Much of a Good Thing?*, 12 Comm Law Conspectus 223, 234 (2004) (quoting Barry M. Aarons, *Does Phone Competition Still Matter?*, Consumers' Res. Mag., Apr. 1, 2003, at 24 (describing the current status of telephony in the United States). One of the primary purposes of the Act — the right to be left alone in the home — would not be

furthered if the prohibition against the use of automatic telephone dialing systems applied only to individuals lucky enough to retain traditional land-based telephone service.

Moreover, courts often construe statutes broadly in order to take into consideration modern advances in technology. It is for this reason that the FCC issued an order stating, among other things, that Congress could not have intended to allow easy circumvention of the prohibitions of the TCPA due to technological advances. In response to a request to clarify whether "fax modem boards" are the functional equivalent of "telephone facsimile machines," the FCC stated:

> the purpose of the requirement that facsimile machines have the capability to identify automatically senders or facsimile messages is to ensure that the requirement that all facsimile transmissions have identifying information is not circumvented. Congress could not have intended to allow easy circumvention of its prohibition on facsimile advertisements by simply using a computer to send a facsimile rather than a stand-alone facsimile machine.
>
> * * *
>
> The question of whether the definition of telephone facsimile machine includes fax boards is a matter of statutory interpretation that falls squarely within the scope of this proceeding. The statute is ambiguous with respect to this question and the legislative history provides no guidance. The manufacturing requirements in Section 227(d)(2) does not specifically address manufacturing of fax modem boards. Nevertheless, it is reasonable to conclude that Congress would not apply different manufacturing requirements to different devices whose users are subject to the same technical

> marking standards. Facsimile modem boards manufacturers are clearly able to provide automatic identification capability in their devices. There is no public policy served by interpreting the statutory ambiguity so as to exclude facsimile modem boards from the manufacturing requirement. We should resolve this issue in favor of a consistent approach for similar devices.

10 FCC Rcd 12391, 78 Rad. Reg.2d (P&F) 1258 (1995) (emphasis in original).

Cases in which courts have interpreted statutes broadly to take into consideration technological advances are legion. A notable example involves the admissibility of infrared spectroscopy tests, where statutes make admissible only chemical tests used to determine blood alcohol level. In the seminal decision regarding the admissibility of such test, the court held:

> To adopt the defendant's position [that only tests using chemicals to analyze breath are "chemical tests" within the statute] would be to bind inflexibly the administration of justice to the level of technology extant at the time of the enactment of the statute while technological advances thereafter would be unavailable to law enforcement officials if they did not fall within the terminology of a dated statute. If such a result is not required, it ought not to be adopted.

State v. Squires, 426 S.E.2d 738, 740 (S.C. 1992) (quoting *People v. Jones*, 461 N.Y.S.2d 962 (1983).

Interpreting statutes to take into account technological advances are common in the telecommunications industry. E.g., *Minn. Microwave*, 190 N.W.2d 661, 666 (Minn. 1971) ("It is not disputed that the grant of jurisdiction made to the

commission in 1915 can properly take account of and regulate changes on telephone service brought about by mere changes in the state of the art of telephony."); *Digital Paging Sys., Inc. v. Pub. Serv. Comm'n*, 360 N.Y.S.2d 931, 934-35 (App. 1974) (accepting the commission's conclusion that "the statutory definitions of 'telephone line' and 'telephone corporation' were legislatively drafted in broad enough terms to include technological advances in the telephonic communications industry" and that paging services were a type of telephonic communication); *Radio-Fone*, 193 N.W.2d at 447 (determining that the holder of a government issued certificate to provide "telephone service" authorizes the holder to use "new and improved devices and methods for telephonic communication" including non-wire mobile phone service). Thus, the term "call" should be defined with the view that Congress expected the TCPA to take into consideration technological advancements in telephonic communication, and not telephone services as conducted in 1991, the year the TCPA was enacted.

While text messaging technology may not have been widely available when the TCPA was enacted in 1991, the drafters wisely chose not to limit the reach of the statute to "calls" capable of communicating "two-way communications" or "voice" messages. Instead, Congress recognized that when a telephone rings, a "call" has been made. Common sense examples include:

- If a phone rings but the person does not answer it, he knows he received a call.
- If a person programs a phone to make a distinctive sound when another person calls, and the called party hears that distinctive sound when her phone rings, she knows the other person called even though she did not answer the phone.
- If a person agrees with another person that three rings indicates that the other person has arrived, and his

phone rings three times at the appointed time, he knows not only that the other person has arrived, but also that he received a call.

- If a person makes numerous calls to another person and that person does not answer the phone, she may tell the other person the following day that, "I called you on the telephone all night."

None of these examples involve "two-way communications," let alone a "voice" communications. Yet, a phone call was unquestionably made in each example under the ordinary meaning of the phrase "telephone call." Adopting Acacia's strained interpretation would also lead to bizarre, and clearly unintended, results. For example, if the definition of the word "call" required a "voice" communication, telemarketers could barrage the deaf and hearing impaired with uninvited telephone solicitations with impunity.[5]

3. Acacia's Position Is Contrary To Decisional Law

A recent TCPA decision confirms that a prohibited call does not require "two-way" communication, let alone a "voice" communication . In *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105 (Ohio Ct. App. 2002), the Ohio court of appeals held that hang-up calls that were placed by an automated dialing machine for the sole purpose of detecting recently connected telephone numbers so that the telemarketer could generate a list of numbers to be called in the future constituted a "call" under the TCPA. *Id.* at p. 1118.

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5. For example, a "TDD" machine allows a deaf person to conduct a telephone conversation with another person by typing comments into a "relay" device. The caller types his message into the TDD machine, and the message is then transferred across standard telephone lines to the recipient's TDD machine and displayed on the recipient's TDD video screen. The recipient sends response messages in the same manner. *Rendon v. Valleycrest Productions, Ltd.*, 2002 WL 1331541, *5 (11th Cir. 2002).

The *Irvine* court noted that the statue referred only to the "initiation" of a prohibited call, not the completion of one. 770 N.E.2d at 1118. As the court made clear, "[There is no language in the statute requiring that a conversation take place." *Id.* The court went even further, noting that "the mere ringing of the phone could constitute a violation." *Id.* According to the court,

> when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at the other end of the line.

Id.[6] Acacia's interpretation of the word "call" cannot not survive the clear precedent established by *Irving* or the sound reasoning the court employed to reach its legal conclusions. The court of appeals was persuaded by the *Irvine* decision. [Pet. App. 11a - 12a]

4. The Court Of Appeals Correctly Ruled That Acacia Made A "Call"

The court of appeals resorted to well-established rules of statutory construction to determine its meaning. Because the purpose of the statute is to regulate the "receipt automated telephone calls," the court of appeals concluded (for the reasons set forth in the Opinion) that the word call means "an attempt to communicate by telephone ... even if the attempt does not present the potential for a two-way voice intercommunication." [Pet. App. 12a] As the court of appeals correctly noted in the Opinion,

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6. Of course, the *Irvine* court's holding that a "call" does not require any communication at all (let alone a "two-way voice communication") when a prohibited call is made by an automatic dialing system logically applies to all sections of the TCPA.

> [I]t is the act of making a call, that is, of attempting to communicate to a cellular telephone number using certain equipment, that the TCPA prohibits. Whether the call had the potential for a two-way real time voice communication is irrelevant. Accordingly, we hold an attempt to communicate by telephone constitutes a call under the TCPA even if the attempted communication does not present the potential for two-way real time voice communication.

[Pet. App. 12a]

V. The Issue Of Class Certification Is Not Before This Court

Acacia's concerns (more aptly fears) about class certification and the potential size of any resulting judgment [*see* Petition at 9] has absolutely nothing to do with any issue before this Court. Class certification has not been decided and no legitimate basis exists for citing this unresolved issue as a reason why the Petition should be granted.

VI. The CAN-SPAM Act

The passage of the CAN-SPAM Act, 15 U.S.C. §§ 7701-7713, twelve years after the TCPA went into effect does not help Acacia.[7] The United States Supreme Court has

7. The CAN-SPAM Act, which became effective on January 1, 2004, was enacted to protect consumers from unwanted commercial e-mail, known colloquially as "spam." It imposes a number of restrictions on the sending of commercial e-mail, defined as messages that have as their primary purpose a commercial advertisement or a promotion of a commercial product or service. The CAN-SPAM Act also contains a section concerning unwanted messages to wireless devices, such as cellular telephones. Specifically, § 14(b), codified as 15 U.S.C. § 7712(b), directed the FCC to issue rules protecting consumers from "unwanted mobile service commercial messages," (Cont'd)

repeatedly warned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 117 (1980). Further, settled principles of statutory construction generally prevent deducing the intent behind one Act of Congress from implications of a second act passed years later. *Penn Mutual Co. v. Lederer*, 252 U.S. 523, 537-538 (1920). The court of appeals Opinion emphasized both of these legal propositions. [Pet. App. 22a] Because the lower courts did not need to look outside of the TCPA to discern its meaning, and because courts must apply the law in effect at the time they renders their decisions, it would be inappropriate to rely on subsequent legislation.

Moreover, as the court of appeals correctly observed, neither the text of the TCPA nor its legislative history demonstrates that Congress intended the CAN-SPAM Act, and only the CAN-SPAM Act, to apply to unsolicited text messages sent to cell phone users. [Pet. App. 21a] The court of appeals articulated two reasons for its conclusion.

First, "Congress contemplated the CAN-SPAM Act and the TCPA could have dual applicability. Section 14(a) specifically states "'[n]othing in this Act shall be interpreted to preclude or override the applicability of [the TCPA] . . .' 15 U.S.C. § 7712(a)." [Pet. App. 21a] Second,

> although certain members of Congress may have thought the CAN-SPAM Act was the first legislation to attack unwanted text messages sent to wireless devices, their perceptions, stated years after the passage of the TCPA, fail to demonstrate

(Cont'd)
or "MSCMs." An MSCM is a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service (as such term is defined in [47 U.S.C. § 332(d)(1) (2004) in connection with such service." 15 U.S.C. § 7712(d).

> the TCPA was inapplicable to the text messages Acacia delivered to Joffe. None of them mentioned the TCPA and none of them expressed any opinion about its applicability to text messages.

[*Id.*]

VII. The TCPA' Ban On The Use Of Automatic Telephone Dialing Systems For Sending Text Messages To Cell Phones Comports With The First Amendment

According to Acacia, if the Court concludes that the text messages Acacia sent to Mr. Joffe's cell phone are covered by the TCPA, then the statute infringes on its right to free express under the First Amendment. No TCPA cases support this proposition. However, the leading TCPA case on point — *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1994)— is *dispositive* of the constitutional issues before the Court.

A. *Moser* Is Directly On Point and Controlling

In *Moser*, an association of automated telemarketers brought an action against the Federal Communications Commission ("FCC"), challenging the Constitutionality of the provision of the TCPA prohibiting the use of automated telephone dialing systems to deliver voice recorded messages. Noting that because the TCPA does not require the FCC to distinguish between commercial and noncommercial calls, the court stated that the Act should be the statute should be analyzed as a content-neutral time, place, and manner restriction. *Id.* at 973. A time, place and manner restriction will survive a First Amendment challenge so long as the restrictions "are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 973.

Notably, the *Moser* defendant conceded both the government's significant interest in residential privacy and whether the TCPA's curb on telemarketing advances that interest. *Moser*, 46 F.3d at 974. The defendant did so for good reasons. The Ninth Circuit independently noted that "Congress accurately identified automated telemarketing calls as a threat to privacy." *Id.* at 974. According to the court, Congress had found that calls using automated devices were "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons' because such calls cannot interact with the customer except in preprogrammed ways and do not allow the caller to feel the frustration of the called party . . ." *Id.* at 972 (quoting S. Rep. No. 102-178, 102d Cong., 1st Sess. (1991)). The court also noted that Congressional findings are entitled to a "great deal of deference." Concluding that the restrictions in the TCPA leave open many alternative channels of communication, the court held that the TCPA does not run afoul of the First Amendment. *Id.*

The rationale of the Ninth Circuit court of appeals is well reasoned and persuasive. Moreover, it represents the leading case, precisely on point, on the issue of the constitutionality of the ban against the use of automatic telephone dialing systems to make prohibited phone calls.

B. The Relevant Portion Of The TCPA Is "Narrowly Tailored" To Further An Important Government Interest

1. The Protected Interest

Acacia conveniently ignores what is clearly the most significant interest identified by Congress — the right to be free from unwanted, invasive, and annoying telephone calls. The concerns articulated by the drafters of the TCPA appearing below are illustrative and compelling:

> Unlike other communications media, the telephone commands our instant attention. Junk mail can be

> thrown away. Television commercials can be turned off. The telephone demands to be answered.

137 Cong. Rec. S18317-01.

As shown above, Senator Hollings referred to this type of intrusion as "telephone terrorism." Mr. Justice Banders described the "right to be let alone" as "the most comprehensive * * * and the * * * (one) most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, (1928) (dissenting opinion). And, as *Moser* makes clear, the government has a significant interest in protecting consumers against this very type of privacy invasion.

The court of appeals also recognized that cell phones have "permeated American life, and have replaced traditional 'land line' telephones in many homes and business." [Pet. App. 27a] Further describing the significant government interest which the TCPA serves, the court stated that,

> People keep their cellular phones on their person at nearly all times: in pockets, purses, and attached to belts. Unlike other modes of communication, the telephone commands our instant attention. While junk mail may be thrown away unopened, and television commercials turned off, the telephone demands to be answered. In protecting the privacy of cellular telephone subscribers from automated callas, the TCPA serves a significant government interest.

[Pet. App. 27a]

Acacia further states that "the recipient of a text message on a cellular telephone hardly feels called upon to engage in any sort of conversation, or even to hear the speaker's message at all . . ." [Petition at 16] This baseless contention is similar to what Acacia urged with the court of appeals, when it stated that "a text message [does not] necessarily

interfere even minimally with a person's ability to be 'left alone' . . . [because] cellular telephone handsets can easily be set such that no alert tone or vibration is triggered by the receipt of a text message." As demonstrated below, the interference with a person's right to be left alone is very severe.

Cell phones allow users to communicate through two-way voice communication or text messages. People often need to leave open channels of communication even when they are in an environment where cell phone calls are not permitted. SMS text messaging fulfils that need. The ability to switch to an "alert" mode for incoming SMS text messages may signal an emergency or other extremely urgent situation requiring the recipient's immediate attention. Being inundated with promotional messages such as those sent by Acacia, even when a call phone is switched to an alert mode with regard to the receipt of SMS text message calls, substantially interferes with a person's ability to be left alone. The interference is arguably more severe because the recipient is forced to see if the incoming call is truly an emergency or just another spammer like Acacia delivering its unwanted messages over and over again.

Contrary to Acacia's contentions [Petition at 16-17], the Supreme Court has recognized that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment right of the intruder." *FCC v. Pacifica Found*, 438 U.S. 726, 748 (1978) The case upheld an FCC ruling that prohibited the daytime broadcast of indecent language.

2. The Speech Restriction Is "Narrowly Tailored"

Acacia erroneously asserts that Congress has "actually *taken* a narrower and less speech-suppressing approach in the CAN-Spam Act." [Pet. at 17 (emphasis in original)] According to Acacia, under the CAN-SPAM Act, cell phone users will be able to regulate the receipt of wireless commercial text messages by either giving prior consent to their receipt of such messages, or electronically signaling their desire to stop receiving such

messages. [Pet. at 8] However, Acacia conveniently overlooks the fact that the ban against using automatic telephone dialing system to make calls to cell phones is not prohibited if the telemarketer obtains the prior consent of the called party. *See* 47 U.S.C. § 227(b)(1)(A). And while this section of the TCPA does not exempt calls if the recipient "signal[s] a desire to stop receiving such messages," there is no evidence that this technology was available when the TCPA was enacted in 1991. Thus, Acacia is wrong when it asserts that the CAN-SPAM Act is less restrictive than the TCPA.

The court of appeals correctly concluded that, "[B]y prohibiting only those calls from automatic dialing systems, Congress narrowly tailored the TCPA to achieve this goal [government interest can be served by some less-speech-restricted alternative] in a way not substantially broader than necessary." [Pet. App. 28a]

C. The TCPA Leaves Open Alternative Channels Of Communications

Finally, contrary to Acacia's contention, the TCPA leaves open many alternative channels of communications. As the *Moser* court made clear,

> [T]he restrictions in the Act leave open many alternative channels of communication, including the use of taped messages introduced by live speakers or taped messages to which consumers have consented, as well as all live solicitation calls. That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice.

46 F.3d at 975. The court of appeals reached the same conclusion. [Pet. App. 28a]

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

STEVEN M. RUDNER
Counsel of Record
JOHN C. JOSEFSBERG
RUDNER LAW OFFICES
5001 Spring Valley Road
Suite 225E
Dallas, Texas 75224

Attorneys for Respondent